KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036

(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 955-9792
www.kelleydrye.com

BRAD E. MUTSCHELKNAUS
DIRECT LINE: (202) 955-9765
EMAIL: bmutschelknaus@kelleydrye.com

September 12, 2005

**VIA ECFS**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. sec. 160(c) in the Omaha Metropolitan Statistical Area - WC Docket No. 04-223

Dear Ms. Dortch:

Talk America Inc. ("Talk"), by its attorneys, submits this letter in opposition to the Qwest Corporation ("Qwest") Petition for Forbearance ("Petition") in the above-captioned proceeding. Qwest has failed to demonstrate that competitive local exchange carriers ("CLECs") have alternative sources for section 251 and 271 unbundled network elements ("UNEs") and Qwest's Petition should be denied.

Talk, a provider of local, long distance, and international services to both residential and business customers, agrees with other commenters that Qwest relies on inapt indicators of competition in the Omaha market to support its Petition. In particular, Qwest asserts that forbearance from the unbundling requirements of Sections 251 and 271 is justified because there is sufficient competition in the Omaha market and CLECs "primarily use their own network and facilities to provide their telecommunications services."[1] However, as other commenters have noted, Qwest relies, incorrectly, on evidence of competition in the retail market as justification for forbearance in the wholesale[2] and enterprise markets.[3] Customers in

1 Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c), WC Docket. 04-223 at iii-iv (filed June 21, 2004) ("Qwest Petition").

2 *See, e.g.*, Comments of the Association for Local Telecommunications Services at 4-6 (Aug. 24, 2004) ("The existence of alternatives for retail customers does not equate to the

the wholesale, enterprise and retail service markets have distinct needs and demands, and competition in one market does not necessarily equate to competition in other markets.[4] While the retail service market arguably may be competitive, Qwest has not demonstrated that CLECs have adequate alternative sources of the UNEs necessary to serve other market segments in Omaha. Qwest should not be granted forbearance in the enterprise or wholesale markets unless and until Qwest can demonstrate that CLECs have adequate alternatives to the bottleneck facilities needed to provide service to the CLECs' customers.

The provision of residential telephone service by cable television ("CATV") providers using broadband facilities does not justify the grant of Qwest's request for forbearance from its Section 251 and 271, 47 U.S.C. §§ 251, 271, requirements to provide narrowband UNEs. Qwest states that the Omaha telecommunications market is competitive because of the presence of competitors like Cox Communications, Inc. that "offer[] CATV-based telephony service throughout all of Qwest's service territory in the Omaha MSA using its own coaxial fiber network."[5] While CATV providers like Cox usually provide telephone service via broadband

---

existence of alternatives for wholesale customers."); Opposition of Comptel/ASCENT at 9 (Aug. 24, 2004) ("Due to its alleged loss of market share in the retail local exchange market, Qwest claims that it is entitled to relief from all of its Section 251(c) duties."); Comments of McLeodUSA Telecommunications Services, Inc. at i (Aug. 24, 2004) ("Qwest dwells on issues related to the retail market . . . . while at the same time avoiding the fundamental question, that Qwest is dominant in the provision of wholesale loops and transport in the Omaha MSA.") ; Opposition of MCI, Inc. at 6 (Aug. 24, 2004) ("Qwest is seeking relief for all services but presents evidence that is largely relevant only to residential local exchange services.").

3 *See, e.g.*, Ex Parte of CompTel at 6 (Sep. 9, 2005) ("Qwest's own admissions elsewhere suggest that competitive entry has not occurred in business markets in Omaha."); (Opposition of AT&T Corp. at 12 (Aug. 24, 2004) ("Qwest's analysis also focuses entirely on the residential market and fails to address Qwest's dominance in the provision of local services to business customers."); Opposition of MCI, Inc. at 3 (Aug. 24, 2004) ("Qwest does not establish even that much competition exists in the small and enterprise business markets.").

4 *See, e.g.*, Opposition of Time Warner Telecom at 5 (Aug. 24, 2004) ("Qwest ignores critical differences in demand characteristics among residential/mass market, small/medium and large businesses. . . . [I]f Qwest possesses market power in the provision of business class services, any competition it may face for services in other product markets, for example mass market broadband or narrowband services, would place little or no constraint on Qwest's ability to harm competition and consumer welfare in the markets for business class services.").

5 Qwest Petition at 8.

facilities including DS1 and DS3 trunks,[6] many CLECs like Talk depend on narrowband DS0 loops to serve their telecommunications customers. The fact that some customers in Omaha are being served using broadband facilities does not justify granting forbearance from providing the narrowband UNEs needed to serve other customers. Qwest also cannot point to facilities-based CLECs like McLeodUSA and AllTel, as "ready sources for . . . capabilities used by CLECs."[7] McLeod has stated that "no competitor has overbuilt Qwest's network so as to allow CLECs to choose providers for these necessary facilities"[8] and further explained that it was able to enter the Omaha market only because Qwest had a legal obligation to provide access to its bottleneck facilities pursuant to Sections 251 and 271,[9] the very regulations from which Qwest now seeks forbearance. Consequently, neither CATV providers like Cox nor facilities-based providers like McLeodUSA can serve as alternative sources for the narrowband facilities needed by certain CLECs and, as a result, Qwest's petition for forbearance must be denied.

If the Commission does grant Qwest's Petition on the basis that Cox is a successful competitor in Omaha, the Order should clarify that forbearance is based on the fact that Cox uses its own facilities, and not Qwest UNEs, to provide service. The Order also should clarify that any grant of forbearance was not based on the presence of a few successful CLECs in Omaha, since those CLECs can compete only by relying on Qwest's UNEs. For example, while Qwest points to McLeod as a successful facilities-based provider in Omaha, Qwest also recognizes that McLeod depends entirely on wholesale elements that would be eliminated if Qwest's Petition is granted.[10] Talk respectfully urges the Commission to deny Qwest's Petition

---

6 *See, e.g.*, Cox Business Services at 3, attached to Ex Parte Letter from Gary Lytle, Qwest to Marlene Dortch, Federal Communications Commission (Aug. 25, 2005) (describing Cox's services as including, but not limited to, Digital Business Lines, Digital Trunks, DS-1 and DS-3).

7 Qwest Petition at 26.

8 Comments of McLeodUSA Telecommunications Services, Inc. at 8 (Aug. 24, 2004).

9 Comments of McLeodUSA Telecommunications Services, Inc. at 8 (Aug. 24, 2004).

10 Qwest Petition, Affidavit of David L. Teitzel at 18 (stating that as of December 2003, McLeodUSA's service was provided via UNE-L (65%), UNE-P (30%) and resale of Qwest services (5%)).

for forbearance or, in the alternative, to limit any grant of forbearance to only those UNEs which Qwest has demonstrated can be obtained from alternate sources.

Respectfully submitted,

Brad E. Mutschelknaus

Brad E. Mutschelknaus

*Counsel for Talk America Inc.*